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ABSTRACT

The manner in which the United States courts have attempted to establish the validity of remedies and gain public acceptance of court orders in desegregation issues has encouraged public resistance to desegregation laws. In education related matters, the courts usually call on the expertise of lawyers and university professionals who have little contact with public education. Monitoring commissions established to provide information on implementation of court orders are composed of people who lack legal knowledge, are unrepresentative of the public school constituency, and may be biased. Responsibility for implementing desegregation orders that incorporate educational achievement goals is assigned to the administrative structures under which the need for remediation developed. Hence, most witnesses in litigation have thrived in the systems under assault, and may be defensive. The minorities who constitute most urban school populations feel powerless in demanding accountability from systems administered by personnel of a majority race and higher socioeconomic status. Finally, court decisions are based on inadequate data generated by poorly managed school systems. To improve the situation, judges must understand the school systems concerned in desegregation orders; frame orders in language that cannot be misinterpreted; and reassess the viability of attaching educational achievement goals to desegregation orders. (Author/MJL)

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Education and the Courts
Reflections on Reality

by

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EDUCATION AND THE COURTS
Reflections on Reality

C.W. Leftwich and Mary Sochockyj

It is a widely accepted truism that our system of law and order is dependent upon the assumption that most of the citizenry are predisposed to honor and obey the law of the land. Particularly throughout the history of court cases involving the Constitution, orders issued from benches carry with them a tradition and a sense of expectation that those people at whom orders are directed will tend to respond with compliance and cooperation.[1]

In this country, in regard to law, it may very well be that until recently, it has been easier to uphold the law than to disobey it. However, this would seem to be less true since the courts have found themselves involved in the whole area of what is often disparagingly called "social engineering" (civil rights, voters' rights, affirmative admissions or hiring programs, etc.). This would seem particularly obvious when one looks at Northern school desegregation cases, and would suggest that the truism is in dire need of reevaluation.

Perhaps in no other set of judicial decisions has overt resistance, bordering on flagrant contempt (refusal to obey), been so manifest as in the domain of "forced busing." Adherents to the cause of the "neighborhood school" have even gone so far as to attempt to paint the efforts with the brush of legitimacy by likening it to the civil rights demonstrations and the civil disobedience acts of the Reverend Martin Luther King. Of course, the fallacy of this play is self evident: the King movement was ever ready and willing to pay the penalty of "unjust" laws in the interest of focusing attention on the

injustice, while the more recent kind of resistence, in fact, disavows any liability for punitive measures, and indeed, renounces the validity of the existence of the law and the decisions emanating from it.

Remedial action in Fourteenth Amendment violation cases is based upon a set of rules addressing equity[2] that have grown out of judicial decisions. This in and of itself has to some degree legitimized the raising of questions about the appropriateness of remedial measures. In the North, beginning with Swann[3] and culminating (at present) in Dayton,[4] there has been an ongoing assessment of the reliability and/or validity of judiciary decisions, and an evaluation as to the appropriate parameters for compliance with "equity" decisions. Of necessity, political/social/economic factors (unique to each situation addressed) have been taken into account in determining what is "practical" to accomplish "at once," [5] but at the same time, the judicial decisions have progressed with an assumption that remedial consistency should be a naturally following result. Swann signaled the beginning of a long-legal process of clarifying the appropriateness of judicial remedial desegregation orders by focusing on the need to redefine de facto to meet de jure requirements, and on the concomitant question of the use of vehicular transportation[6] as a legitimate tool to achieve remedy. Since Swann, courts have apparently been attempting to respond to the vacuum of public support for implementation of Constitutional remedies in the North.[7]

When involved in areas of little or no previous direct contact and apparently in response to the need for establishing validity of remedy, the courts have frequently resorted to the retention of "experts" and/or "special masters." In matters pertaining to education, highly regarded and esteemed professors of education, deans of schools of education, or in some instances, former deans,

presidents or professors of institutions of higher learning have been asked to serve as court experts. For the most part, lawyers have been named as special masters; on the basis of esteem or an apparent special knowledge of the intricacies of public education, they have been deemed able to carry out the many quasi-judicial functions to achieve both a Constitutionally valid remedy, and a practical approach to implementation of that remedy. On the face of it, the selection of these persons is most logical. One must agree that the court experts are, in fact, often highly renowned and extensively published, and they are available (i.e., their teaching loads are flexible). They are well known and respected often by virtue of university status, and they probably have the ears of many members of the "mover and shaker" group of the city in which the remedy is being fashioned. It is probably appropriate for such people to be named since in most cases the school administration itself has relinquished its role by default or declination. Given that university and college institutional operation tends to be very much removed from the day to day life of public schools, however, we would suggest that the odds of such persons fashioning a remedy that will "work now"[8] are very slim.

In addition, apparently in the attempt to address the need for public acceptance, as well as to encourage the dissemination of accurate reporting on facts of the case, federal courts have turned to the establishment of "citizen monitoring commissions." These monitoring commissions have varied in composition from a representation of a broad range of supporters and dissenters, to a totally supportive representation. They are usually inducted with a great deal of public fanfare and recognition, and are charged with providing the court with timely information about implementation of remedial orders. By and large,

these "watchdogs" are given little or no orientation to the background of the orders and the legal assumptions surrounding the remedy; neither are they provided with any overview of the inner workings of the system in question or the cast of characters involved. Rather, they are appointed and are expected to begin operation (i.e., to monitor).

Frequently, these monitoring commissions have as membership a component of the "outs" of the political arena; these "liberal losers" in the political clash for political support often use membership on court appointed commissions to fulfill their fantasies of "making a difference." In addition, there is the "blue ribbon" constituency of such groups -- part of the "movers and shakers" of the city, who have by omission (if not commission) over the years contributed to the perpetuation of a school structure in violation of the Constitution. Their largely private school educational backgrounds and their social and political lives have for the most part isolated them from firsthand interaction with that segment of our society represented by the plaintiffs in these cases.[9] Absent an intensive orientation and consciousness raising program, therefore, it can be expected that the polarity between resident populations (parents of children affected by the remedy) and the monitors (representatives of the court) will initially be exacerbated.

The fact that each person who accepts a position in a monitoring role brings his/her own strengths, weaknesses, predispositions, experiences, political beliefs, social expectations and personal biases to the job is seldom (if ever) considered, and certainly has never been openly acknowledged. Also, the specific role and function of the group is seldom (if ever) clearly defined in a way that ensures that each member fully understands the weight or gravity of statements,

pronouncements, and reports of either the individual or the group. This raises the issue of the legal status of these monitoring commissions. What is the legal status of reports generated and disseminated by monitoring commissions? Do they hold equal status with evidence obtained under the normal adversarial procedures? Do they have sufficient legal standing as to warrant direct orders from the bench in response? Clearly, if the legal status is questionable, then the judiciary can expect a pattern of high interest, maximum response, declining interest, and minimum response, on the part of these volunteers who bring their individual and collective expectations to the commission.

Finally, we would suggest that the judiciary has become aware (whether consciously or not) that there is a need to make remedial desegregation orders palatable to the public. This has led to a relatively new trend or approach to remedial desegregation orders, the inclusion of "educational aspects." Milliken[10] introduced variables concerning educational accomplishment/deprivation as legitimate inclusion in remedial orders. Is is in no way our intent to question the appropriateness of these mandates. Certainly, in the remedial order for Boston, Judge W. Arthur Garrity articulated noble, proper goals, and in Cleveland, Judge Frank J. Battisti has similarly properly ordered a plan which promises remediation for the educational disadvantages and adversities which have been experienced by plaintiffs as an outgrowth of total racial isolation.[11] It is not surprising that the educational leadership of the Detroit Public Schools recognized the need for educational remedy as an inclusion in the orders[12] of Milliken, nor that this is similary evident in the Boston and Cleveland cases.[13] However, recognizing the importance of the assumption that courts depend upon the willingness of people to obey the law, we must be chary of the long term

effect of these educational promises, unless there exists some process for ensuring their fulfillment with the same vigilance and effectiveness as the assignment of students and the provision of vehicular transportation.[14] The problem is that these most promising aspects of remediation which hold forth so much hope to children and parents is left in the hands of the same administrative structure which imposed the conditions bringing about the need for remedy. In effect, we have a fox commissioned, indeed ordered, to develop a security system to prevent his reentry into the hen house.[15]

During the litigation, the court is confronted with a series of witnesses. For the most part, those witnesses for the defense have consisted of line administrators who have usually professionally "grown up" within the school system under legal assault. They have overtly or covertly supported, influenced, and by and large, ignored the implications of policy decisions which ultimately lead to determination of guilt: violation of the Constitutional rights of plaintiffs. This is an important issue which cannot so easily be placed on the "back burner" pending determination of liability, since ultimately, by virtue of standard court protocol, the decision in favor of the plaintiffs requires the same administrators to fashion a Constitutionally valid remedy. It is very difficult (and understandably so) for the judiciary to conceive that highly placed school administrators could respond as they have and do. But it must be understood that school administrators have frequently been found to obfuscate in response to a questioning board, and even more so to an aggressive populus.[16]

In dealing with their schools' boards and with the public at large, public administrators tend to equivocate and interpolate rather than to give direct

answers. When asked, for example, why reading scores are not improving, it is not unusual to hear a great deal of "dodging" of the issue. School administrators have testified before Congressional committees that more money is needed, and when confronted with the evidence that there is no correlation between dollars expended and absolute achievement, have said (with a straight face, and without any clearly defined intent to change the basic institution) that it is because not enough money has been provided. It is difficult to determine the degree to which this is "hedging" and to what degree logical, rational understanding has been replaced by apologies to the public, or by the manufactured explanations which result from a personal stake in the system and from a conviction that "there is nothing to be done." As such, it is not surprising that testimony in litigation involving public administrators frequently borders on overt perjury. This well may be simply improper behavior in an improper place, namely the court. Such testimony may be simply a transference of what is expectable behavior for a skillful administrator who is accustomed to being attacked by the taxpaying populace. But the total inappropriateness of this kind of defensive skulldudgery may also add to a tendency toward an increasing antagonism between administrators and the court as the case proceeds.

On the other hand, these same administrators (largely inexperienced in the adversarial procedure of litigation) frequently find the intense questioning and probing (which is a part of the process) to be seriously threatening, and very much unlike the deferential questioning experienced in board and community meetings. This too contributes to the polarizing (whether acknowledged or not) and helps to feed the contest of wills to obey or not to obey the law. Skill

and experience in the realm of educational administration, which becomes a central issue in remedial aspects, makes the experienced school administrator a formidable adversary. During remedial litigation, recollection of public exposure or perceived abuse as a part of the judicial process encourages response in a manner which can seldom be proven to be perjurous, but at the same time, can seldom be shown to be affirmatively compliant. This is probably the clearest area in which reliance upon the truism of "willingness to obey" comes into full conflict with the reality of day to day experience.

The school administrators who are charged with implementing a remedial order find themselves in a "no win" situation. As was noted previously, they by and large owe their professional standing and recognition to the system whose policymakers have now been found guilty. The "double bind" experienced may be not unlike the dilemma of a child who is bitten by a previously friendly dog. The question must always be there, even for the most enlightened: how could an organization which has been so good to me and has recognized my talents and rewarded me be guilty of these charges? And on the heels of having to address such a personal confrontation, there emerges in the remedial development the necessity for participation in altering that system and its procedures. At the time during which the liability is found, the typical urban public school administrator encountered is in a position which has been achieved through a kind of "reward system." In most cases, this individual feels that years of commitment and dedication to all kinds of picayune tasks (and presumably to hard work) has resulted in being designated as a leader in the institution. It must be traumatic when this leader is faced with the shattering evidence in liability hearings, and with the attack of an adversarial litigation in which the school system is shown to have been abusive to the rights of a

class or number of individual students. In addition, during the attack upon the school system, there is a great deal of confusion that results from the interposition of the school administrator as person, rather than as the representative of the school system.

These days it is not unusual to find many public school administrators of the same race as the plaintiffs. Over the past decade, it has become increasingly more rare to find an absence of Black administrators. The traditional administrative roles held by Blacks, however, have tended to allow little or no real impact upon policy or practice. The positions often have carried a great many trappings of authority, have paid reasonable, regular salaries, and have constituted a kind of "holding action" within the school system. Often, the highest ranking Black administrators have appeared at functions of government or other affairs with the superintendent, perhaps for public relations sake, to imply a unity which may not have been borne out in job description or function. Nonetheless, it is not difficult to understand why a person enjoying this kind of public status might feel a greater investment in aligning oneself with the past than might be expected.

The extant "spoils system," then, tends to cause another problem for the federal courts as they interact with educators in the course of litigation, since there is theoretically an immediate split between the plaintiffs and those professionals involved that are perceived as members of the plaintiffs' racial group. As such, these professionals tend to become part of the problem rather than part of the solution, if for not other reason, perhaps, than self interest.[17] When one recognizes that it is the in-system administrators who are best equippped to handle implementation of desegregation (or for that matter the implementation of any legislative remedy), and when one realizes that the

administrators that have been described are saddled with the kinds of burdens that inhibit a new mode of performance, one cannot help but be somewhat less than sanguine about the possibility of leadership emanating from this source to remedy a Constitutional violation.

In the best of all possible worlds, a superintendent of schools would be able to create a Constitutionally acceptable plan, but one wonders whether this is ever possible. It is certainly true that in case after case of Northern school desegregation litigation,[18] unacceptable plans have been submitted, the court has ordered defendants to reevaluate their stance, technical assistance has been provided, serious adversarial litigation has developed, and finally, a plan has been imposed upon the school system, with the result that administrators can easily say that they do not understand how to implement a plan which they themselves have not developed. And it is not difficult to understand why a school administrator, a policy making body, and a structure, all committed almost by definition to a pragmatism based on an understanding of the political atmosphere, would find it difficult to take the risk of imposing the radical (and often unpopular) change mandated by guidelines of judicial remedies to be applied "forthwith." It should not be surprising, then, that initial system-developed responses to requirements for a remedy seldom meet Constitutional requirements. Rather, the scenario is one of expressed need for further clarification, frustrated response with the planning parameters, further requests for clarification, further frustrated response with parameters, further solicitation of clarification, threat of contempt, and submission of inadequate response.[19]

In addition, although there may always have been vigilence regarding tax dollars

in suburban or rural school systems, until recently urban school systems have tended to be insulated from direct accountability, because the populations they serve tend to be large, minority, and poor -- a group with a sense of political impotency and a hesitancy to confront bureaucratic structures and the policy makers and top level administrators who tend to be majority race and of a different economic and social class. In a city such as Boston, which has a municipal overburden in large part because it houses a great many tax sheltered properties, a kind of quasi-control by the mayor or council results from the necessity for expending such a huge effort to acquire reasonable resources. Even in a city such as Cleveland where there is the necessity to approach the citizenry for funds through a levy, it is interesting to note that for some reason there was almost unanimous approval for a capital levy to build schools that are still being paid for, that did not need to be built,[20] and that literally created and perpetuated an illegal, segregated school system.

urban public school systems

It must be recognized and understood that the quality of educational delivery in Northern urban centers has been well documented as being less than acceptable.[21] The educational structures of these centers were able over many years in the early part of this century to respond to the needs of many diverse ethnic language groups to learn to compute and to read and write the English language,[22] but now for all intents and purposes have thrown up their hands in addressing the needs of black and brown and yellow and poor white children of the Sixties and Seventies.

Further, it would seem that judges frequently have a misplaced confidence in the overall ability of public school administrators to plan, to deal with

figures, to look at projections, and to deal with dollars and cents and budgets. These expectations may result from exposure to educators in private schools, colleges, or law schools, rather than to the urban public school administrators (superintendents, deputy superintendents, planners) who appear in the course of litigation concerning urban public school desegregation. When confronted with the adversarial procedures of litigation, school administrators often show that they have less than a thorough grasp upon such detail as cost per pupil expenditures, patterns of enrollment, teacher/pupil ratio, etc., and what in fact emerges is a kind of "we've always done it that way" response. Judges find this response to be suspect when it comes from managers of multi-million dollar budgets, and this sense leads to increasing alienation. Credibility is further strained when the suspicions are coupled with recollection of testimony about decisions on boundary changes and enrollment justifications.

In fact, it is important to acknowledge that urban public schools are by and large very poorly managed organizations. Often, it is next to impossible to obtain accurate figures on such fundamental issues as achievement levels, dropout rates, attendance, absences and tardiness. In almost every Northern desegregation case, there has been great dispute about the amount of "white flight" which takes place in the first year of the implementation of a remedy. In several of these cases, there was no solid sense of the system's actual enrollment immediately prior to desegregation, and yet a great deal of confidence has been placed ex post facto in the legitimacy of those figures.[23] This would seem to be part and parcel of the fundamentally poor management system that operates in urban public education today. We would suggest that there is ample evidence to support this presumption of bad management. What

emerges in case after case is a pattern of pupil assignments based upon faulty enrollment figures, the initiation of an elaborate transportation program based upon faulty criteria for eligibility, the establishment of an expanded budget attributable to desegregation costs,[24] and a very clear opportunity for the local administrators to disavow any responsibility for the existence of the many pupil problems associated with an inefficient system.

The judiciary should therefore not be surprised to find that in the course of remedial action data are frequently found to be unobtainable or to be of questionable validity when produced. Intent is obviously a most difficult factor to define and even more difficult to prove. Nevertheless, it would seem sensible to predict that school administrators who have over the years participated in the violation of plaintiffs' rights will find it difficult (to say the least) to adjust and respond affirmatively to remedial actions when found liable. When the administrators in the case are racially identified with the plaintiffs, what then occurs is at best a "chess game" and at worst an open defiance. In either case, the stage is set for the introduction of inflammatory propaganda in the form of prophecies of decline in pupil achievement, lower enrollments, etc. School administrators whose professional careers and status have been fostered by the system which has violated the Constitution can be expected to support the status quo, at least initially.

Even in those circumstances in which the experts are able to establish a "working relationship" with school system administrators, lack of familiarity with the many deficiencies in managerial skill and/or management data precludes anything but a predictable "trial and error" approach. This has resulted in multiple year involvement of the courts and its experts with the the imple-

mentation of a remedial plan. Needless to say, the remedial stage is the crucial stage. The final remedy is the ultimate promise. We would suggest that the implementation of the remedy has proved to be a rose that has lost its bloom. Predictably, the hue and cry emerges that the court is too much involved in the day to day operations of the school system; the fact is that, although regrettable, this is true. But it is only true because of the overriding need for achieving full implementation of the required Constitutional remedy.[25]

Being thoroughly grounded in court practice and procedures, the lawyers for all parties frequently take for granted that the professional representatives of management of a school system are equally as familiar and knowledgeable concerning court protocol. The comfort of being in one's bailiwick may well contribute to the fostering of a false sense of security regarding the ability of the client or the adversary witness to present the most effective case, by testimony. Absent a briefing orientation and indoctrination of terminology, lawyers may very well contribute to the confusion and thus by omission to the polarizing impact of faulty remedies based upon inadequate or incomplete data. We would suggest that administrators rapidly learn to adopt a stance of "I'll respond to what I'm asked, and nothing else" and the lawyers a stance of "what has been testified is the total body of fact." This leaves the judge and his/her experts in the dilemma of fashioning an ordered remedy that meets Constitutional, evidential requirements, and that at the same time complements the informal (if equally inadequate) data which has been gathered in efforts to assist the school system in responding. The plaintiffs' attorneys share the burden of this dilemma. In general practice, representation consists of a combination of

local lawyers backed up by (and in fact led by) a national cadre of experienced specialists in the field. This national staff has gradually dwindled and its burden to stay abreast of the individual nature of each case has increased. In addition, the strains on the coffers and the delay in payment of legal fees as a part of remedial orders contribute to a rising sense of need for local autonomy politically.

There would appear to be a workable formula or script for establishing liability and for subsequently developing appropriate remedy. At the same time, in recent years, that script may well be in need of serious revision (or shall we say, updating). For with greater and greater resistance, that is to say, unwillingness of parents to obey the law of the land as it pertains to their children's reassignment, a new pool of resources has emerged in the form of politicians, sociologists, researchers, and indeed, school administrators. This pool seems to be sharing experiences and contributing to and perhaps forming a new strategy for resistence to desegregation implementation orders.[26] As a result, the potential for serious deleterious impact upon positively intentioned remedial orders has been exacerbated, particularly because to some degree the courts are limited, since it is the attorneys who must initiate actions and motions regarding compliance, deadlines, etc.[27] Unless there is a constant willingness to reexamine the effectiveness of orders and to reassess the course of action, it can be expected that the resulting lack of clarity will tend to hinder affirmative implementation by public school administrators who are already unwilling to take risks with respect to their jobs.

In fact, given all of these circumstances, it may well be that the provision of an improved educational delivery system resulting from the implementation of

a desegregation order cannot possibly occur in the "first generation" of the implementation. It may well be that adversarial relationships, and conflict and constant struggle are absolutely vital ingredients in making such a total change in an institution and that it is only the leadership which emerges in the "second generation" which can accomplish such a change. Perhaps at present in the North, we are faced with the fact that it may be a number of years before it is clear what true benefits (if any) the educational delivery system will gain as a result of desegregation implementation.[28] The administrative structures of desegregated systems, after all, do not come into being in a matter of two or three years; rather, they are the result of a long period of adaptation and gradual change. Perhaps it is delusive to expect to find clear evidence of benefit immediately following the desegregative activity.

We would suggest, then, that judges owe it to themselves (as well as to those for whom the remedy is administered) to become as familiar as possible with the total history or evolution of the particular school system in question. Who are the cast of characters who have served as members of the school board over the years? How have they been chosen? What kind of leaders have been responsible for the administration of the school system? Who interacts with whom? Who controls what kind of communication? What is the interrelationship of organizations -- teachers' unions, administrators' unions -- and what is their relationship to the power structure? What is the history of the system's ability to respond to crisis? What is the true structure of the institution? What are the leadership and management capabilities and limitations? What is needed is a thorough understanding of what the system is all about. It may be be thought that this is not appropriate behavior or involvement for a federal

judge who is determining liability and remedy. But it is certainly clear that if the judge understands the system and the persons involved, then s/he will be better prepared for the various diversions which will be attempted,[29] and will be better able to evaluate the actual efforts being made to establish a Constitutional, desegregated system.

Another important area for judges to consider is the need to frame orders, guidelines or directions in a language and manner that is so clear that only willful determination will lead to misinterpretation.[30] This is particularly important, since, as was mentioned earlier, there is a tendency on the part of public school administrators to display dilatory behavior in regard to mandates for sweeping change. In this respect, again, a thorough familiarity with the structure at hand is most helpful in determining what kind of remedy can be clearly defined and pragmatically implemented. Public school administrators should be able to clearly understand what is expected, what the task is, and to be able to seek and/or be provided with clarification when necessary. To this end, also, the judge must understand how to require and assess reports on progress. Given the ability and proclivity of public administrators to obfuscate,[31] it may very well be necessary to require very specific reports in very specific formats to allow a true determination of what progress (if any) is being made in achievement and compliance with the court's order. (Clearly, this could also be of great benefit in educating a confused public about real issues: desegregation vs integration, Constitutionally acceptable assignments vs "freedom of choice," provision of access to schools of assignment vs "forced busing.")

It must also be suggested that judges ask themselves to what degree they

are potentially contributing to long term disenchantment with the law by holding out false promises of improved educational quality. The recently released Rand Corporation study of the effects of the Elementary/Secondary Education Act (ESEA) and the previously released American Institute for Research (AIR) report on innovations in education would suggest to us that there is no significant correlation between expressed goals for improvement of achievement and actual educational achievement of the public population served when federal resources are provided. We public school administrators who so profusely have included educational components in remedial responses must also professionally question ourselves. Are we, in fact, fully cognizant of the implications of what we propose, or are we rather attempting to smooth a rocky path to a financial raid of the coffers of the federal government, particularly the Department of Education? Are we using the mandates of the judicial process as an excuse to continue to avoid difficult fiscal management decisions by assuming a federal support through desegregation implementation funds for personnel and activities that perpetuated a segregated system?

As a result of the Northern urban center confrontation with desegregation implementation, i.e., the confrontation between public education and the judiciary, the major tragedy which may well emerge could be less an issue of racial isolation than the inability of existing public educators and educational systems to deliver adequate (let alone efficient) educational services to their black, brown, yellow and poor white constituents, not to mention those who are not English speaking. The major tragedy may well be that, while in contest regarding the Constitutionality of assignments, the judiciary and the public education sector may become unwitting allies in the total destruction

of confidence in the ability of the public education sector to deliver services to the satisfaction of the need for a fully literate populus.

The U.S. Supreme Court continues to uphold desegregation orders as Constitutional remedies. In the meantime, urban public school populations are changing from majority white to majority black/brown, but they remain the poor who have no other options. The time has come to reconsider not the issue of Constitutionality as such, but rather the functional appropriateness of traditional remedies. The logic and creativity which resulted in reassignment of pupils as the remedy, and then in the inclusion of educational components as part of that remedy, need to be brought to bear on the problem. We believe that logic and creativity unfettered by attachment to past formulae can lead to solutions and approaches that will in fact remove the "vestiges of damage" inflicted in the process of subjection to legally determined "de jure" segregation.

NOTES

1. "Compliance with decisions of the Court, as the constitutional organ of the Supreme Law of the Land, has often, throughout our history, depended on active support by state and local authorities. It presupposes such support. To withhold it, and indeed to use political power to try to paralyze the Supreme Law, precludes the maintenance of our federal system as we have known and cherished it for one hundred and seventy years." Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401 (1958).

2. "In fashioning and effectuating the decrees the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shapping its remedies and by a facility for adjusting and reconciling public and private needs." Brown v. Board of Education, 349 U.S. 294, 299-300 (1955).

3. Swann v. Charlotte Mecklenburg Board of Education, 402 U.S. 1 (1971).

4. Brinkman v. Gilligan et al., 583 F. 2d 243 (1978).

5. "...(E)arliest practical date....". Green v. County School Board of New Kent County, 391 U.S. 430, 439 (1968). "Under explicit holdings of the Court the obligation of every school district is to terminate dual school systems at once...." Alexander v. Holmes County Board of Education, 396 U.S. 19, 90 S. Ct. 14 (1969).

6. That is, "forced busing." Note that: "Bus transportation has been an integral part of the public education system for years, and was perhaps the single most important factor in the transition from the one-room schoolhouse to the consolidated school. Eighteen million of the Nation's public school children, approximately 39%, were transported to their schools by bus in 1969-1970 in all parts of the country." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

7. Although it is often forgotten that this was an issue in the South, in fact, in the process of dismantling two separate educational systems and moving students from one system to another, the burden was skewed (i.e., Black students bore the burden of being moved) and implementation of desegregation in the South did not begin until ten years after orders were issued.

N.B.: "From the perspective of 1974...one must bear in mind, however, the social and political climate which surrounded these events in the middle to late 1950's. Governors, legislators, and other prominent spokesmen in the 'hard core' states of the deep South -- soon joined by such supposedly moderate states as Arkansas and Virginia -- were trumpeting defiance of the Supreme Court. The question that preoccupied the courts and the public at large was not how to achieve broad scale desegregation, but whether and how soon absolute resistence to the very principle of desegregation could be overcome." Fleming, Harold C., "Brown and the Three R's: Race, Residence, and Resegregation." In From Brown to Bradley, School Desegregation 1954-1974, edited by R. Stephen Browning, Cincinatti and Washington: Jefferson Law Book Co., 1975, p. 9.

8. Green v. County School Board of New Kent County.

9. Thus, while their own children may daily be transported to non public schools in relative peace, such "liberals" have no difficulty in mouthing support for the cook or the yardman whose child is "bused" into a hostile environment and subjected to missiles in the form of stones, pipe elbows, etc., and hence fears for his/her very life.

10. Milliken v. Bradley, 418 U.S. 717 (1974).

11. Morgan v. Kerrigan, 409 F. Supp 1141 (1975); Reed v. Rhodes, 422 F. Supp 708 (1976).

12. Only a lawyer could project whether the court in and of itself could have ordered them, absent the submission of these educational remedies by school administrations.

13. The Detroit case (Milliken v. Bradley) involved remedial reading components and extensive vocational education program mandates. The Boston case (Morgan v. Kerrigan) focused upon the establishment of an extensive parental involvement program, which had as its goal specifically the improvement of educational delivery as well as the pairings of local universities and businesses with specific schools or groups of schools. In Cleveland, Reed v. Rhodes calls for a wide range of educational remedial activities, from reading programs and improvement of guidance to parent involvement and university/business cooperation.

14. In fact, there are times when there is not much "vigilence and effectiveness" in assignment of students and provision of vehicular transportation, either. In Cleveland, for example, it was necessary (more than once) to postpone plans for implementation of desegregation because of the unavailability of buses. See Vail, Thomas et al., "School Busing Delayed," The Cleveland Plain Dealer, 26 August 1978; see also Weidenthal, Bud, "Board Can't Promise Buses," The Cleveland Press, 11 April 1979.

Also in Cleveland, assignments in a "mini" desegregation in February 1979 resulted in segregated classrooms. See Jensen, Christoper and Stephen Adams, "Blacks Segregated at West Side School," The Plain Dealer, 21 March 1979; "School Ends its All Black Classes," The Cleveland Press, 22 March 1979; Jensen, Christopher and Stephen P. Adams, "Carlin Takes Blame for Segregated Class," The Cleveland Plain Dealer, and Jensen, Christopher and Stephen Adams, "Find Schools in Contempt, Judge Urged," The Cleveland Plain Dealer, 27 March 1979.

15. The expansion of the need for "court experts" to oversee and develop Constitutionally acceptable remedial plans is self evident in Boston, Cleveland, Detroit, Dayton, Los Angeles, etc.

16. This is particularly demonstrated in so called public hearings regarding annual school budgets. See, e.g., Adams, Stephen P., "School Board Assailed at Financial Hearing: Simpler Budget Sought, Officials Blamed for Woes," The Cleveland Plain Dealer; and Bartimole, Roldo, "Past Catches up with Briggs, School Board," Point of View, 4 March 1978. See also "School Information: Is it Available and Understandable to the Public?" Ohio Senate Education Committee Report on Cleveland City School District Fiscal Problems, 12 June 1978, p. B-9.

17. As urban school systems experience increasing minority enrollments it is not unusual to hear elected Black officials faced with the responsibility for implementing desegregation plans to mirror the concerns previously expressed by their white counterparts, with statements such as "quality education is the answer" and "you mean, a Black child has to go to school with a white one to get a good education?" and these statements are made in spite of full knowledge that desegregation is ordered only after a finding of Constitutional violation. See, e.g., Almond, Peter, "Pinckney Hopes to Avoid Court Feud on City School Segregation," The Cleveland Press, 9 February 1973. The Black (then) school board president is quoted as saying, "It has not been proved to me that white students sitting alongside black students must get a better education, which is apparently what the NAACP has been saying..." On the other hand, some time after Arnold Pinckney's resignation, Rep. Louis Stokes' announced that Mr. Pinckney would oppose Rep. Ron Mottl's efforts to pass an "anti busing" Constitutional amendment.. "Stokes reveals Pinckney fears of busing curb," The Plain Dealer, 24 July 1979.

18. To wit, Morgan v. Kerrigan (Boston, Mass.), Reed v. Rhodes (Cleveland, Ohio), Evans v. Buchanan (Wilmington, Del.), etc.

19. It is worth noting that responses to remedy in the North initially submitted by school systems violating the 14th Amendment of the Constitution have surprisingly followed the same pattern of remedial plan implementation in the South.

20. "Interest payments alone, including this year's projected cost, totalled $76.4 million since 1970 on school buildings. That doesn't include other borrowing. And now the schools are being shut and sold." Bartimole, Roldo, "Business Establishment Major School Villain," Point of View, 26 May 1979.

21. See, e.g., Adams, Stephen P., Christopher Jensen, Karen R. Long, and Geraldine M. Strozier, "Cleveland's Battered Schools," series of articles, The Cleveland Plain Dealer, 13-20 May 1979.

22. "The shift to a new language has been peculiarly difficult for the Puerto Ricans. We can only speculate about the reasons why Jews and even Italians, coming into the city at roughly the same ages, with much less formal knowledge of English, should have made a rather better linguistic adjustment. Certainly the schools did much less to ease their path. Of course in the years of the heaviest Jewish and Italian migration the school-leaving agee was much lower, children often began working at 12, and the problems that the schools must today face (which are severer with the older children) were reduced. In other words, the children who could not learn English forty years ago got out before their problems became too noticeable. But we can only guess at the differences -- no one seems to have gone back to see what the schools did when whole districts were filled with Yiddish-speaking and Italian-speaking children." Glazer, Nathan and Daniel Patrick Moynihan, Beyond the Melting Pot, Cambridge, Mass.: The M.I.T. Press, 1963, p. 127. Clearly, there needs to be more work done on this topic. We cannot agree with Glazer and Moynihan that the fact that children tended to leave school at age 12 is any indication that they were not by that time English speakers and readers, since they seem to have been able to function in the workplace.

For a position contrasting with Glazer and Moynihan, see Rist, Ray C., The Urban School: A Factory of Failure, Cambridge, Mass.: The M.I.T. Press, 1973.

23. The authors recall that questions regarding the accuracy of enrollment data for Boston Public Schools were raised as late as the week before implementation, and that in Cleveland, there were at least three different statements of pupil enrollment data. In fact, as recently as 25 May 1979, a memorandum from the Assistant Superintendent for Personnel of the Cleveland Public Schools informs "certificated personnel" that "Owing to uncertainties in certain areas, need projections were not possible at this time...." (Emphasis added.)

24. "There are lots of myths and realities on the cost of desegregation. Many of the cases coming down now also specify program improvement, which are designed to include the quality of education for large numbers of children. Is that a proper accounting if you charge that up to desegregation? If you are doing what good school systems really ought to do, you can charge that up to desegregation. If it is an add-on, the district would not have done it anyhow, but if it is a representation of the energy a district would be spending in some form for its quality education, then maybe it's not right to charge it to desegregation." Cunningham, Luvern, "Decelerating/Declining Resources in Public School Education," presented to Rocky Mountain School Study Council, 6 February 1979.

25. "In seeking to define even in broad and general terms how far this remedial power extends, it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation....Judicial authority enters only when local authority defaults....As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 1971.

26. For example, the formation of private schools has increased and there has been a remarkable movement toward fundamental/basic education. In addition, the growth to national status of local "anti-busing" groups (such as ROAR-Restore Our Alienated Rights, and CORK-Citizens Opposed to Rearranging Kids) is a recognized fact.

27. Nor is it helpful to reiterate court orders that have already been issued. Federal District Court Judge W. Arthur Garrity, in a statement from the bench in Morgan v. Kerrigan, advised parties that orders of the court would not be "watered down" by continued reminders and reissuance, but rather, must be obeyed.

28. Court expert Dean Robert Dentler of Boston, Mass. observed in a speech to the Indianapolis Teachers' Association members that "only now" (four years later) were the educational benefits becomming manifest in the Boston school system. Also, Superintendent Robert Wood (formerly Chairman of the Citywide Coordinating Committee on Desegregation Implemenation in Boston) observed in early 1979 that at last the educational system in Boston is turning the corner toward improvement.

29. "...In sorrow and with regret that never since this thing started on the complaint of the United States in 1968...has any IPS Board...gone very far to do anything really, unless they were pushed and ordered, and then when they are ordered they usually...come up with an alternative idea that doesn't go quite as far as the order, or you want a stay or something...anything to put it off." U.S. v. Board of School Commissioners of Indianapolis, 503 F. 2nd 68, 1974.

30. "...Although the city defendants have submitted certain studies to the court, these have been forthcoming only after time consuming requests by the defendants for explanations of obvious statements, or with the help of outside expertise provided by the court or at the direction of the court.... For these reasons, filings containing studies and information vital to the formulation of a final desegregation plan have been consistently late or incomplete." Reed v. Rhodes, Remedial order of 8 February 1978.

31. Perhaps the best example of this can be found in the Cleveland case, in the report of the U.S. Department of Justice investigating the appropriateness of charging the Cleveland local defendants with criminal contempt. See Adams, Stephen P. and Christopher Jensen, "School officials face U.S. ire, " The Plain Dealer, 15 November 1979.

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